SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. _____

STATE OF MISSISSIPPI FOR THE USE AND BENEFIT OF J. E. SHOEMAKER, ADMINISTRATOR OF THE ESTATE OF RAY GRANT, DECEASED,

Petitioner,

versus

J. F. THAMES AND UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is found at page 251 of the Record and was written on February 27, 1941 and is reported in 117 Fed. (2nd) page 949. The dissenting opinion of Judge Holmes is found at page 257 of the Record. The opinion of the District Court is found at page 232 of the Record.

II.

Jurisdiction.

1.

Jurisdiction is invoked under the Judicial Code, Section 240 as amended; 43 Statutes at Large 938; Section 347 U. S. C. A. 28.

2.

Jurisdiction is sustained by *Forsythe v. Hammond*, 166 U. S. 506, 41 L. Ed. 1095; *Hamilton Brown Shoe Co. v. Wolf Bros. Co.*, 240 U. S. 251, 60 L. Ed. 629; *Bradford Electric Light Co. v. Clapper*, 284 U. S. 221, 76 L. Ed. 254; *Mecom v. Fitzsimmons Drilling Co.*, 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R., in this, that:

(a) Decisions holding that the citizenship of an administrator of an estate must be looked to in determining federal jurisdiction were ignored.

(b) Decisions of the Circuit Court of Appeals of the other circuits announcing the principle of law set out above were entirely ignored and are in conflict with the decisions of the Court in the instant case.

(c) Rule 17 of the Federal Rules of Civil Procedure was ignored by the majority opinion of the Circuit Court of Appeals for the Fifth Circuit in this cause.

III.

Statement of the Case.

Reference is respectfully made to "Summary Statement of Matter Involved", *supra*, in the petition for certiorari.

IV.

Specifications of Error.

Specification No. 1.

The Court erred in finding and holding that the United States District Court for the Southern District of Mississippi did not have jurisdiction.

(a) The suit was brought by J. E. Shoemaker, Administrator of the Estate of Ray Grant, deceased, against J. F. Thames, Superintendent of the Mississippi State Penitentiary, and the United States Fidelity & Guaranty Company for acts of negligence in official duty on the part of the said J. F. Thames. The complaint and exhibits are found in the record at pages 1 to 12. J. E. Shoemaker was a resident citizen of the State of Louisiana. J. F. Thames was a resident citizen of Mississippi. The United States Fidelity & Guaranty Company was a Maryland Corporation but was qualified to do business in Mississippi. The amount in controversy exceeded Three Thousand ($3,000) Dollars, exclusive of interest and costs.

(b) Sections 510, 1628 and 1712 of the Mississippi Code of 1930 authorize a personal representative to sue in his own name.

(c) The Mississippi case of the *Mississippi Power Co. v. Archibald*, 196 So. 760, does not take away the right of the administrator to sue in his own name.

(d) Damages for pain and suffering under Mississippi law cannot be recovered by the heirs of a deceased person but can only be recovered by the personal representative.

(e) Jurisdiction of the Federal Courts is for the decision of the Federal Courts themselves and cannot be varied by State Court decisions.

Specification No. 2.

The Circuit Court of Appeals for the Fifth Circuit erred in reversing the District Court and erred in not affirming the judgment of the Distict Court.

Specification No. 3.

The Circuit Court of Appeals for the Fifth Circuit erred in refusing to consider the cause on its merits and in refusing to sustain jurisdiction.

SUMMARY OF ARGUMENT.

Point A.

The reasons upon which a writ of certiorari should be granted are as follows:

1. The decision of the Circuit Court of Appeals in this cause is in direct conflict with decisions of the Supreme Court of the United States in the following cases:

Mecom, Adm., v. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R. 904.

Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 23 S. Ct. 211, 47 L. Ed. 245.

Hess v. Reynolds, 113 U. S. 73, 58 S. Ct. 377, 28 L. Ed. 927.

City of New Orelans v. Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102.

Bullard v. City of Cisco, 290 U. S. 179, 78 L. Ed. 254.

Memphis State Railway Co. v. Moore, Adm., 243 U. S. 299, 37 S. Ct. 273, 61 L. Ed. 733.

Susquehanna & Wyoming Valley R. R. & Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179.

Continental Life Ins. Co. v. Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380.

Rice v. Houston, 13 Wall. 66, 20 L. Ed. 484.

Payne v. Hook, 19 L E.d. 260.

2. The decision of the Circuit Court of Appeals in this cause is in direct conflict with the decisions of the Circuit Court of Appeals for the Third, Sixth and Eighth Circuits in the following cases:

City of Detroit v. Blanchfield, 13 Fed. (2nd) 13 (Sixth Circuit).

Chambers, et al. v. Anderson, 58 Fed. (2nd) 151 (Sixth Circuit).

Guarantee Trust Co. v. Collins, et al., 76 Fed. (2nd) 870 (Third Circuit).

Curb & Gutter District No. 37 of City of Fayetteville, Ark., et al. v. Parrish, 110 Fed. (2nd) 902 (Eighth Circuit).

3. The decision of the Circuit Court of Appeals in this cause ignores Rule 17 (a) of the Federal Rules of Civil Profedure.

Point B.

The facts shown by the record discloses a case of liability against J. F. Thames, Superintendent of the Penitentiary, for the wrongful death of Ray Grant, the intestate of J. E. Shoemaker, Administrator. The horrible facts and circumstances of the homicide were presented to the jury under direct and controlling principles of law, and the District Court should have been affirmed, and jurisdiction should have been sustained.

V.

ARGUMENT.

Point A.

The decision of the Court below is contrary to and in conflict with prior decisions of this Court. We respectfully call the Court's attention to the case of *Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R. 904*, where a full and complete discussion by this Court of the law governing the instant case is found. In that case the statute of the State of Oklahoma was substantially the same as the statute of Mississippi. The only real difference is that in Oklahoma the action was required to be brought by the administrator; whereas, in Mississippi, the action may be brought by the administrator or by the parties beneficially interested.

The majority opinion in the lower court attempted to follow the case of *Mississippi Power Co. v. Archibald, 196 So. 760.* That case involved the question of removal jurisdiction of the United States District Court and further held that an administrator was a nominal party and that his citizenship was not material in determining federal jurisdiction and is in conflict wth the federal authorities on the subject.

Mecom, Adm., v. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R. 904.

Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 23 S. Ct. 211, 47 L. Ed. 245.

Bullard v. City of Cisco, 290 U. S. 179, 78 L. Ed. 254.

The opinion in the *Archibald* case was ignored and did not refer to the Federal Rules of Civil Procedure, particularly Rule 17.

Federal jurisdiction is a federal question. In the instant case jurisdiction was based on the ground of diversity of citizenship. In determination of a federal question, the United States Courts are controlled by federal statutes and decisions and are not bound by State decisions on federal jurisdiction. It goes without arguing that the Federal Courts are bound by decisions of a State Court where those decisions are substantive law. The *Archibald* case did not overrule the following Mississippi cases: *Hill v. Henderson*, 6 Sneeds & Marshall 351; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537; *McVey v. Illinois Cent. Railroad Co.*, 73 Miss. 487, 19 So. 209; *Wagner v. Gibbs*, 80 Miss. 53, 31 So. 434, 92 Am. St. Rep. 598; *Conklin v. Alabama & V. Railroad Co.*, 81 Miss. 152, 32 So. 920; *Mobile, J. & K. C. R. Co. v. Hicks*, 91 Miss. 273, 46 So. 360, 124 Am. St. Rep. 679; *Yazoo & M. V. R. Co. v. Jeffries, Admx.*, 99 Miss. 534, 55 So. 354; *Hamel v. So. R. Co.*, 108 Miss. 172, 66 So. 426, 809; *Newman Lumber Co. v. Scipp*, 128 Miss. 322, 91 So. 11; *Edward Hinds Yellow Pine Trustees v. Stewart*, 135 Miss. 331, 100 So. 12; *McNeely v. Natchez*, 148 Miss. 268, 114 So. 484; *Rowe v. Fair*, 157 Miss. 326, 128 So. 87; *Miss. Power & Light Co. v. Smith*, 169 Miss. 447, 153 So. 376.

The statutes in Mississippi to be applied are Sections 510, 1628 and 1712 of the Mississippi Code of 1930. These statutes are quoted in the appendix.

In the instant case, there was an allegation in the complaint of pain and suffering of the deceased prior to his death, and it was alleged that the pain and suffering were caused by the negligence of Thames. In the *Archibald*

case, there was no allegation of pain and suffering of deceased prior to his death.

The case of *Berryhill v. Nichols, 171 Miss. 769, 158 So. 470*, holds that recovery for pain and suffering is not to be had by the next of kin of a deceased or by his heirs at law, but that recovery can only be had in a suit by a personal representative. This case, though urged and cited by the administrator, was ignored by the majority opinion in the Circuit Court of Appeals.

Quoting from the dissenting opinion of the Circuit Court of Appeals in the instant case, we find as follows:

> "The duty to follow state laws, where it is owed, is so great that even dictum may tip the scales in a doubtful case, but a single utterance in the reasoning of an opinion cannot uproot principles which have been imbedded in the jurisprudence of a state by repeated uniform decisions over a long period of years. The statement in the Archibald opinion that the administrator acquired no title to the cause of action by reason of his appointment means either that he acquired no beneficial title or that the title became vested in him when he filed suit, not upon his appointment. The term cause of action may mean one thing for one purpose and something different for another. United States v. Memphis Cotton Oil Co., 288 U. S. 62, 67, 68, 53 S. Ct. 278, 77 L. Ed. 619. The term may refer to the facts giving rise to the action or to the right to institute and carry on the action. Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316. The former is substantive, the latter is remedial. Douglas v. Daniels Bros. Coal Co., 135 Ohio St. 641, 22 N. E. 2d. 195, 125 A. L. R. 761, 766. *In the Archibald opinion, I think the court used the term in its substantive sense.* It did not mean that the administrator had no remedial right of action." (Italics ours).

We respectfully call the Court's attention to the recent case decided by the United States Supreme Court on April 28, 1941, No. 727 and styled *"The Shamrock Oil & Gas Corp. v. G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Co."*, wherein it was said:

> "But at the outset it is to be noted that decision turns on the meaning of the removal statute and *not upon the characterization* of the suit or the parties to it *by state statutes or decisions.* Mason City & Ft. Dodge Ry. Co. v. Boynton, 204 U. S. 570. The removal statute which is nationwide in its operation, was intended to be uniform in its application, *unaffected by local law definition or characterization* of the subject matter to which it is to be applied. *Hence the Act of Congress* must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts. Cf. Hammel v. Burnet, 287 U. S. 103, 110." (Italics ours).

While the above quotation was with reference to the removal jurisdiction, the same doctrine was applicable in the instant case where the question was one of original jurisdiction. See also: *Kloeb v. Armour & Company*, 85 Adv. Op. 156, 61 S. Ct. Rep. 213, U. S. Law Week, p. 4065, (No. 65) decided December 9, 1940.

The case of *Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 118*, and cases following it have no application to the questions involved in the instant case for the reason that the questions in the instant case are governed by state law, and the right of the administrator to bring the suit arose out of Sections 510, 673, 674, 1628 and 1712 of the Mississippi Code of 1930. (These sections of the Mississippi Code are found in the appendix).

The primary question arose out of said Section 510. Before the *Erie Railroad* case was decided, state statutes as construed by state decisions were binding upon the state courts. Therefore, in the instant case, all questions of substantive law of either tort or contract were governed by state statutes and decisions, but if the state created a cause of action and empowered an administrator to sue thereon in a state court, it could not deny that right in the Federal Court nor lay down a new doctrine with reference to whose citizenship is determinative of federal jurisdiction.

Point B.

The majority opinion in the Circuit Court of Appeals below indicated that the opinion of the District Court was most persuasive and did not pass on the cause or its merits and erred in not affirming the action of the District Court and in not considering the cause on its merits and refusing to sustain jurisdiction.

Conclusion.

It is therefore respectfully submitted that the Circuit Court of Appeals erred in reversing and remanding the cause to the District Court and erred in not affirming the judgment of the District Court. It was unequivocably shown that there was diversity of citizenship between the plaintiff and the defendants.

This is a case, therefore, that we respectfully submit calls for the exercise by this Court of its supervisory powers in order that the law may be settled finally wherein confusion exists between the Fifth Circuit and the United States Supreme Court and where confusion exists between

the Fifth Circuit and all other Circuits that have passed on the question herein involved, and in order that the errors complained of herein may be corrected, that a writ of certiorari should be granted and this Court should review the opinion of the United States Circuit Court of Appeals for the Fifth Circuit and reverse the decision of the United States Circuit Court of Appeals for the Fifth Circuit and affirm the judgment of the District Court.

Respectfully,

R. W. THOMPSON, JR.,
WEBB M. MIZE,
FRANK F. MIZE,
Counsel for Petitioner.

By_____